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CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 671

TOWN OF BELLEAIR, FLORIDA, DEBTOR,
A Municipal Corporation,
PETITIONER,

vs.

R. S. GROVES, ET AL, Creditors of the Said Town,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

O. K. REAVES,
Counsel for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES

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RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Town of Belleair, Florida, a municipal corporation existing under the laws of Florida, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered December 29, 1942, affirming judgment of the District Court for the Southern District of Florida entered October 2, 1942 (R. 309).

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* Note: Italics ours unless otherwise stated.

Matters Involved

Vital questions arising under the Bankruptcy Act relating to composition of debts by taxing districts are involved.

The Town filed its petition under the Bankruptcy Act (R.1), with Plan of Composition proposing to refund *all* its bonds at 30 flat (R. 3). The plan was approved by creditors owning 68 per cent of the bonds and about 34½ percent in taxable value of the property of the Town. Objections were interposed by a few bondholders who do not own property in the Town, evidence was taken, and the District Judge wrote an opinion disapproving the plan upon the two grounds ("1" and "3") stated *infra* under the heading "Questions Presented" and other comparatively unimportant grounds (R. 268). An appeal from that order was dismissed upon the ground that it was not an appealable order (In re Town of Belleair, 127 F. (2) 279). Upon the remand of the cause, modifications of the plan and petition praying the approval thereof were filed (R. 289). The District Court granted a motion to strike said modifications, because they did not conform to the former opinion of the Court in the *two* respects herein set forth (R. 298), and declined to pass upon other features of the plan as amended because it was unnecessary. From the judgment dismissing the cause (R. 309), the case was again appealed and was affirmed.

In his findings, the District Judge expressly stated that the property-owning bondholders acted throughout *"in good faith"* and said *"to whom the Court ascribes no ulterior purpose"* (R. 306).

Jurisdictions of this Court

This Court has jurisdiction to review on writ of certiorari judgments of the circuit courts of appeals under Sec. 347, T. 28, USCA, and under Rule 38 of this Court.

Questions Presented

1. Whether the Circuit Court of Appeals erred in holding in effect that the Plan of Composition—proposing to refund *all* bonds at 30 flat—discriminates unfairly as between bondholders who are property owners in the Town and bondholders who are not property owners, solely because the one owns property and bonds and the other owns bonds only—no question of fraud, over-reaching, or fiduciary relation being involved—and where the percentage of bonds owned (about 68 per cent of the total) far exceeds the percentage of taxable property owned (about 34½ per cent of the total) by the group which owns bonds and property.

2. Whether in so holding, upon the authority of *American United Mutual Life Ins. Co. vs. City of Avon Park,* 311 *U. S.* 138, 61 *S. Ct.* 157, the Circuit Court of Appeals has not misconstrued and misapplied the Avon Park decision, to the detriment of petitioner.

3. Whether the Circuit Court of Appeals erred in affirming the judgment of the District Court (although without comment on this point), which held that $90,000 Water and Gas Bonds owned by the

Town, but pledged in trust to secure an unpaid balance of $18,000 loaned to the Town to redeem said bonds, should be counted in the amount of the Town's outstanding indebtedness and refunded; notwithstanding the plan proposes that said $18,000 obligation be not affected by the plan, that the $90,000 Water and Gas Bonds be canceled upon the payment of the $18,000 obligation, and that the Bankruptcy Court so order.

Reasons Relied on for the Allowance of the Writ

(1) The Circuit Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court—a ground for review specifically named in Rule 38 and frequently recognized by this Court, as in *American United Mutual Life Ins. Co. vs. City of Avon Park,* 311 *U. S.* 138, 61 *S. Ct.* 157, where the Court said it granted the petition for certiorari *"in view of the importance of the problems in the administration of the composition and reorganization provisions of the Act."*

(2) The said decision of the Circuit Court of Appeals is in conflict with other decisions, in the comparable situation of stockholder-creditors in reorganization proceedings under Sec. 77 b, to the effect that a stockholder may become a creditor of a corporation; and when he does become a creditor he stands on the same footing, and has the same rights, as any other creditor. (*In re Indiana Central Telephone Co., District of Delaware,* 24 *F. Supp.*

342); and in conflict with the general rule of law that stockholder creditors have the same rights as other creditors (*First National Bank of Birmingham vs. Huddleston* (*Ala.*) 195 *So.* 755; *Pierce vs. Scott et al.* (*Fla.*), 195 *So.* 160; *Fletcher's Cyc. Corp., Permanent Ed., Vol.* 13, *Sec.* 5756), and is grounded upon the decision of this Court in the *Avon Park* case, 311 *U. S.* 138, whereas that case does not support said opinion but, on the contrary, holds that "composition under Bankruptcy Act authorizing composition of indebtedness of local taxing agencies envisage equality of treatment of creditors," notwithstanding which, the said judgment of the Circuit Court of Appeals discriminates between creditors, solely because one owns property in the Town and the other does not.

(3) The decision disregards the right given by statute to leave a well-secured obligation (in a different class) unaffected by the plan.

Prayer for the Writ

Wherefore, your petitioner prays that a writ of certiorari issue, as provided by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals for the Fifth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated at Tampa, Florida, this 16th day of January, 1943.

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Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

(b) Opinions Below

The opinion of the District Judge (Findings of Fact and Law) appears on pages 298-308 of the record. The opinion of the Circuit Court of Appeals appears on page —— of the record; it is not reported.

(c) Jurisdiction

This is an application for writ of certiorari to a circuit court of appeals, authorized by Sec. 347, T. 28, USCA.

(d) Statement of the Case

The statement in the foregoing petition under the heading "Matters Involved" seems sufficient. Perhaps we should add that the opinions of both lower courts contain erroneous and exaggerating figurges, to which we call attention in case the Court should feel that the degree of supposed benefit the property owners would derive from the proposed plan is important. The opinion of the Circuit Court of Appeals says:

> "If the plan were consumated, the bonded indebtedness of the City would be reduced in excess of $1,000,000."

On the contrary, the plan shows that the total indebtedness is only $981,248.22, and it proposed to refund at 30 per cent of the principal amount (R. 4).

The District Judge speaks of the property-owning bondholders (Palmer, Hobart, and Kirkeby; Kirkeby is president of the Hotel company) as owning 63 per cent of the assessed valuation of the property in the Town (R. 270). These figures are erroneous. The *uncontradicted* evidence of Mrs. Smith, the Town Clerk (R. 74, 172), shows the total assessed valuation of the property in the Town to be $2,502,290.40. She breaks it down as follows:

28 per cent, properties of the Hotel;

19 per cent, vacant properties of the Belleair Estates;

41 per cent, *improved properties,* excluding the Hotel;

12 per cent, vacant properties.

On page 172 she says that Hobart's personal holdings represent $80,070 valuation, and Palmer's $84,860, which are 8 per cent and 8 per cent plus, respectively, of *"the improved property valuation of the Town."* The percentage of these sums to the total assessed valuation is 6½, which, added to the 28 per cent of the Hotel properties, makes 34½ per cent rather than 63, as stated by the Court.

(e) Specifications of Errors

The errors relied on are stated in the petition under the heading "Questions Presented," and we urge each of them.

ARGUMENT

Question 1

IS IT UNFAIR, *per se,* IN A PROCEEDING IN BANKRUPTCY TO COMPOSE THE DEBTS OF A MUNICIPAL CORPORATION, TO REFUND PROPERTY-OWNING BONDHOLDERS' BONDS ON THE SAME BASIS AS THOSE OF NON-PROPERTY-OWNING BONDHOLDERS?

Unless there is an essential unfairness, the lower court erred, because there is no other fact in this case adequate to differentiate the two groups. No fraud or over-reaching on the part of the property-owning bondholders is claimed or found. On the other hand, the District Court finds that their acts have been *"in good faith"* and he ascribes to them *"no ulterior purpose"* (R. 306). The Circuit Court of Appeals also grounded its opinion purely upon *essential differences,* saying that the property-owning bondholders' "consent to the proposal was induced by special interests akin to those of the debtor, to bind others who dealt as creditors only." The lower courts' opinions preclude such seemingly pertinent inquiries as whether the plan is, in fact, fair; whether it proposes that the municipality shall pay all it can pay; whether the *predominating* interests of the property-owning bondholders lie on the side of the debtor or of the creditors. How can the plan be unfair to non-property-owning bondholders when it requires the debtor to pay all it can and give to each bondholder an equal pro rata share? The District Court specifically found that

"Under the evidence in the record, thirty

cents on the dollar represents the City's maximum ability to pay" (R. 307),

and the plan proposes to give all bondholders that amount. Since the property-owning bondholders own a greater percentage of the bonds than they own of the tax-paying property (practically two to one), they receive as bondholders more than they pay as property owners; hence they, like the non-property-owning bondholders, will gain by the highest rate of refunding within the ability of the Town to pay. The interests of the two groups, therefore, are not opposed but identical.

If it be assumed that the reduction of the bonded indebtedness of the Town "would necessarily increase the market value of the real estate in the municipality," as the District Judge says, to what extent would it be increased, and how could such increase be measured for the purpose of equalizing the supposed differential? On the contrary, is it not true that the amount of such increase is altogether speculative; that it cannot possibly be translated into money's worth; that it is an intangible, incapable of being measured; that such increase will be a mere incident of the composition, and will accrue to all property in the Town, and if the non-property-owning bondholders wish to speculate thereon they may do so by acquiring property; that such benefit as may result from an increase in value of the property will accrue to property owners *as such and not to them as bondholders;* and that the whole matter of supposed increase of property value is in the category of vague hopes and possibilities, and cannot be given such

tangible and certain form as to be considered in the asset column of the balance sheet of the Town or constitute a basis for judicial determination.

This Court so reasoned in *Case et al. vs. Los Angeles Lumber Products Co.,* 308 *U. S.* 106, 60 *S. Ct.* 1, where the contention was made that certain stockholders were men of wealth and standing in the community, and that their connection with the reorganized company would, therefore, be of sufficient value to justify a proposed retention of 23 per cent interest to them without putting in new money.

Parallel of Stockholder Creditors

It would seem that if property-owning creditors are in a different class from non-property-owning creditors, under the provision of the Bankruptcy Act applicable to taxing units, stock-owning creditors must, upon the same principle, be classified differently from non-stock-owning creditors in reorganization proceedings under Sec. 77 b. The statutes regulating both proceedings are very similar. The plan must be fair to all parties; creditors must consent in each case, etc. The parallel seems to have been recognized by this Court in the *Avon Park* case, where the Court said it granted the writ of certiorari "in view of the importance of the problems in the administration of the *composition* and *reorganization* provisions of the Act."

The District Court of Delaware, in *re Indiana Central Telephone Co.,* 24 *F. Supp.* 342, considered a plan of reorganization. It was found that the en-

tire capital stock of the debtor was owned by General Telephone Corporation, which also owned 67 per cent of the bonds of the debtor-corporation. The amended plan proposed to give the General Telephone Corporation the power to designate five out of the seven directors of the new company, which was to assume the liabilities of the debtor. The question was raised whether the General Telephone Corporation could participate as a bondholder of the debtor equally with other bondholders, and the Court, after investigating the facts, found and stated that

> "There is absolutely no evidence in the record of fraud, overreaching, misrepresentation or prejudice of any kind on the part of General Telephone Corporation."

The Court then said:

> "Objector contends that General Telephone Corporation occupies a fiduciary relationship with debtor because of its ownership of the common stock of debtor and because of interlocking boards of directors and officers. Assume that relationship for the sake of argument, how can it create any fiduciary relationship between General Telephone Corporation and the holders of bonds of debtor? *Surely a holder of the common stock of a company may also purchase the bonds of that company.*"

The Court held the plan to be fair and approved it.

The Alabama court, in *First National Bank of Birmingham vs. Huddleston,* 195 *So.* 755, says:

> "But as a creditor a stockholder is not rele-

> gated to an inferior status because he is a stockholder" (text 757).

Fletcher's Cyc. Corp., Permanent Edition, Vol. 13, Secs. 5755 and 5756, discusses the general subject quite fully and cites many cases. In Sec. 5756, the author says:

> ". . . it cannot be disputed that a stockholder may become a creditor of the corporation . . . and when he does become a creditor he stands on the same footing and has the same rights as any other creditor."

The bankruptcy statute does not change the general principle of equality of rights between stockholder creditors and non-stockholder creditors, and we submit that the Court ought not where unfairness, in fact, has not been made to appear.

In *Texas Hotel Securities Corp vs. Waco Dev. Co.* (5 *Cir.*), 87 *F.* (2) 395, a creditor acquired notes of the debtor for the specific purpose of preventing confirmation of any plan of reorganization. The Court held that such creditor had a right to do so; that

> "Claims may be transferred in anticipation of bankruptcy or during bankruptcy, and transfer usually does not deprive claim of any of its incidents, and Bankruptcy Act amendment providing for corporate reorganization does not prohibit such transfer nor put transferred claims in a peculiar class," headnote 7.

So in this case the silence of the statute upon the question involved should be given great weight.

It has been many times held that claims of taxing districts may be transferred in anticipation of bankruptcy, and that

> "A taxing agency is not to be denied relief under provision of Bankruptcy Act for composition of indebtedness because preliminary arrangements without which relief could not have been sought were made before institution of proceedings."
>
> *In re Corcoran Irrigation District,* 27 *F. Supp.* 322.
>
> *In re Merced Irrigation District,* 25 *F. Supp.* 981, affirmed by the 9th Circuit Court of Appeals in *West Coast Life Ins. Co. et al. vs. Merced Irrigation District,* 114 *F.* (2) 654.
>
> *Luehrmann et al. v. Drainage District,* (8 *Cir.*), 104 *F.* (2) 696.

Unfairness Further Elucidated

The object of the Municipal Bankruptcy Act is to afford relief to debt-ridden, insolvent cities and towns—relief upon a basis fair to all who are to be affected. Fairness is the pole star set to guide the court. When fairness will be achieved, there are no orbitrary or artificial limits set by the act. It is left for the court to decide from all the facts and circumstances of the particualr case, but where fairness is shown the court is not at liberty to produce unfairness by applying different treatments to different bondholders. The elements of fairness are (1) that the petitioner shall pay or refund upon a basis that represents its reasonable maximum ability; (2) that all creditors be treated alike and not be put in different classes unless different situations so require in order to accomplish fairness.

In this case the Court found that the plan requires the Town to pay all it can pay but, contrary to the recommendation of the Master (R. 55, par. 5), held that the mere fact of property ownership by some creditors requires that they be treated unlike non-property-owning creditors, and suggested that the bonds of one be refunded on the basis of 20 percent and the other 40 (R. 272). The District Judge and the Circuit Court of Appeals held that the mere fact of property ownership required a different treatment. If Hobart, Palmer, and Kirkeby (consenting creditors) owned no property in the Town, then 30 per cent to the objectors would be fair, because they would be getting their part of all the Town can pay. If the bonds owned by Hobart, Palmer, and Kirkeby were owned by any non-property-owning parties, the objectors would get the same 30 cents, and that would be fair. Wherein then is it unfair to objectors to receive the same 30 cents, simply because Palmer, Hobart, and Kirkeby do own property in the Town? Why should Palmer, Hobart, and Kirkeby be discriminated against, simply because they happen to own bonds and property? They have done no wrong, committed no fraud, taken no advantage and, like other bondholders, are getting only 30 percent in new securities. We have suggested that if there be a differential there is no yardstick by which it could be measured; that whatever benefit property in the Town may receive is merely incidental, and accrues to property owners as such and not to bondholders; that the amount of such benefit, or whether any benefit at all, is purely theoretical; that any bondholder can become a property owner if he wishes;

that if property ownership *per se* makes equal treatment of bondholders unfair, then stock ownership in a corporation would make equal treatment unfair, which the authorities negative. Moreover, if property ownership *per se* makes equal participation unfair, then if Hobart and others owned only five percent of the property the Court would have to discriminate against them. If it be conceived that 100 percent property ownership coupled with 25 per cent bond ownership could be used to propose an unfair plan, its unfairness would not be found in the simple fact of unified ownership but in the plan. Some extraneous fact—such, for instance, as in *Kaufman County Imp. Dist. No.* 4, 34 *F. Supp.* 670,, affirmed 116 *F.* (2) 959, where only one-fifth of the money borrowed was used to pay bonds and four-fifths to physically improve the property—would have to appear in order to constitute unfairness. If, conceivably, however, a plan would be unfair to other bondholders simply because of unity of ownership of some bonds and property, the ratio would have to be such as to favor the owner as a taxpayer rather than as a bondholder. In this case the ratio is the other way. Palmer and the others pay 34½ per cent of the taxes and own 68 per cent of the bonds; hence they receive as bondholders practically two times what they pay as property owners. So, also, they would profit by any increase in the percentage paid. Obviously they would be better off to pay their part of the taxes and receive it back on their bonds if the Town could pay the bonds.

We submit that the answer to the question posed is to not discriminate against property-owning bond-

holders *per se* but to determine whether the plan is fair, in fact, to all bondholders.

Question 2

DOES THE AVON PARK CASE CITED BY THE CIRCUIT OF APPEALS SUPPORT SAID COURT'S CONCLUSION?

The *Avon Park* case, decided by this Court (312 U. S. 138), reversed the lower court, because the Crummer company, the financial agent of the town in handling the composition, was also a creditor of the Town and had three distinct stakes in the plan, of which it did not advise other bondholders when procuring their consents, and which were not taken into consideration in fixing the compensation of said agent for its services. Hence this Court found that the plan lacked the necessary elements of fairness, good faith and full disclosure to other creditors of the interest of the financial agent, who was also a creditor, etc.

None of these elements is presented in the instant case.

The Circuit Court of Appeals also cites its own decision in *Kaufman County vs. Mitchell,* 116 *F.* (2) 959, affirming *Kaufman County Imp. Dist. No.* 4, 34 *F. Supp.* 670. That was a levee district, and the plan of composition proposed to borrow $300,000, $50,000 of which only should be paid in satisfation of its debts at the rate of 8 cents on the dollar; the balance, $250,000, to be spent upon the lands by im-

proving the levees, etc. Obviously the District was not paying all it could, and the property-owning bondholders were getting the advantage, because five-sixths of the loan was being spent to improve their properties. The Court, therefore, held that such property-owning bondholders could not foist the composition upon the minority bondholders, who owned no property. There the facts were examined and the plan was found to be unfair in fact, whereas in the Belleair case the Town proposes to pay all it can, and all bondholders get exactly the same treatment, but the Court rejects it simply because some creditors own property in the Town and others do not. Moreover, there is a fundamental difference between a levee district, which is created for the sole and only purpose of improving lands within its boundaries, and a municipal corporation, which is an agency of the state, created primarily for governmental purposes. The one has no function except to improve lands; the other has no power to improve lands but only to perform governmental and municipal functions, which sometimes incidentally do improve lands.

Question 3

WAS IT ERROR FOR THE CIRCUIT COURT OF APPEALS TO AFFIRM THE JUDGMENT OF THE DISTRICT COURT (ALTHOUGH WITHOUT COMMENTING UPON THIS POINT), WHICH REQUIRED $90,000 BONDS OWNED BY THE TOWN, BUT PLEDGED TO SECURE AN UNPAID BALANCE OF $18,000 LOANED TO THE TOWN TO REDEEM SAID BONDS, TO BE COUNTED IN THE AMOUNT OF THE TOWN'S OUTSTANDING INDEBTEDNESS AND TO BE REFUNDED, ALTHOUGH THE PLAN PROPOSED THAT SAID $18,000 OBLIGATION BE

NOT AFFECTED BY THE PLAN, AND THAT SAID $90,000 BONDS BE CANCELED UPON PAYMENT OF THE $18,000 OBLIGATION, ETC.?

This point relates to the $90,000 Water and Gas Bonds described in Section 3 of the Plan of Composition (R.6). In 1936, after the Supreme Court of Florida held that all the Town's bonds except the Water and Gas Bonds were invalid (*State vs. Town of Belleair,* 170 *So.* 434, 125 *Fla.* 669), the Town had an opportunity to retire said Water and Gas Bonds at a big discount, but it did not have the means to do so. It raised the necessary money by assigning a balance due it by the city of Clearwater for the purchase price of its gas distribution system and borrowing about $35,000 from six persons and pledging the $90,000 Water and Gas Bonds to secure the loan. A trust agreement was made appointing a bank in St. Petersburg escrow agent, and the bonds and agreement were deposited with said bank, which was to receive the payments and distribute the same between the lenders, and finally, when the debt had been fully paid, to surrender the $90,000 Water and Gas Bonds to the town of Belleair (see the agreement, R. 237). At the time the petition in bankruptcy was filed the obligation had been paid down to $18,000, and the plan proposed that the same be not affected by the plan but that the Court order that the $90,000 in Water and Gas Bonds *continue to exist exclusively as security, and when the remaining* $18,000 *had been paid that they be canceled.*

Judge Waller decreed that the said bonds should be counted as a part of the Town's indebtedness and

should be refunded on the same basis as the other bonds, and that the payment made since the petition was filed should be returned. We submit that such disposition would add expense and complication for no good purpose. *The Town does not owe these bonds—it owns them*—and when the remaining $18,000, which they are pledged to secure, shall have been paid the bonds will be retired and actually canceled. To count them as a part of the bonded debt and require that they be refunded is to handle the matter the hard and expensive way and to bring out $27,000 new and live bonds which no one connected with the plan wants, and which will have to be canceled upon payment of the remaining $18,000, or the Town's debt will be enlarged. The bankruptcy law expressly recognizes that all securities and all creditors need not be affected by the plan (Sec. 403 a, b, d, and f, Title 11, USCA). The plan

> ". . . may include provisions modifying or altering the rights of creditors generally, *or of any class of them,*" etc. (Sec. 403 a), and
>
> "The holders of claims for the payment of which *specific property* or revenues are pledged . . . shall accordingly constitute a separate class" (Sec. 403 b).

The $18,000 is abundantly secured if we value the $90,000 Water and Gas Bonds pledged as security at 30 cents, the proposed refunding value of other bonds; hence the $18,000 must be paid in full, according to the contract. The payment upon principal and interest made since the plan was filed is in accordance with the trust agreement, and it should stand; otherwise the Town will have defaulted.

The ratio between the collateral ($90,000) and the present indebtedness ($18,000) is five to one, whereas the refunding plan is based on approximately three to one; hence it is manifestly to the interest of the Town *and of all creditors* that the present plan for the payment continue, and that the bonds be canceled when the obligation has been paid.

Other Reasons Assigned by the District Judge

The District Judge stated two other reasons to support his idea of a differential, namely:

(1) That the property-owning bondholders would receive in new bonds 100 percent of the price they paid in cash for their existing bonds, and "It does not appear what price the non-property-owning . . . bondholders paid for their bonds"; and

(2) ". . . that certain paving certificates or obligations are to be canceled (error *"may"* be canceled, etc., Sec. 1, R. 4-5) under the proposed plan, which is another benefit the property-owning bondholders would likewise receive if that provision of the plan can be effected."

Since the Circuit Court of Appeals did not base its holding on either of these points, we assume that they are not pertinent in considering the petition for certiorari. We, therefore, but briefly suggest that if the price paid for said bonds by the non-property-owning bondholders has any bearing, they had ample opportunity to prove such price and did not. One of them, Mr. Wright, was called to the stand by

the Town and asked what he paid for his bonds; he replied that he did not know (R. 20). The testimony of other witnesses showed that bonds of the Town had been offered in the market for many years at from 9 to 23 cents on the dollar, practically without takers, and the presumption must be indulged that the non-property-owning bondholders acquired their bonds somewhere within that range. Until the consenting bondholders bought at 30 cents under the special circumstances stated in the record, the highest known sale of the bonds of the issues here involved was 20½ (R. 82, 147).

The District Judge's statement that the bonds are to be canceled is not exactly correct. The plan provides

> ". . . that the Town *may adjust or cancel* said special assessments as its governing authority shall deem best, in order to encourage the sale and improvement of properties in said Town and to thereby increase its tax-paying ability" (Sec. 1, R. 5).

The reasons set forth in the plan why it seems expedient that said certificates be adjusted or canceled are that the special assessments are inferior to the liens of State, County, and Municipal taxes accumulated against the property, and that such accumulated State and County tax liens aggregate *"a sum in excess of the value"* of the lots against which the assessment liens exist; that the validity of said assessments is in dispute; that it would cost more to enforce them than could be realized from them; and that to adjust or cancel them would tend to en-

courage the sale and improvement of properties in the Town (R. 5).

The Master found:

> ". . . that the unpaid balances on these assessments are worthless by reason of the fact that the taxes which are prior liens against the same properties are in an amount exceeding the present market value of the properties" (R. 52, par. 14; R. 55, par. 2).

The proposal to adjust or cancel these assessments is authorized by Chapter 21112, Special Acts of 1941 of the Laws of Florida, and accords with the opinion of the Court in *Vallette vs. Vero Beach* (5 *Cir.*), 104 *F.* (2) 59, text on page 64, column 1. In that case the Court approved a similar proposal, holding that the State statute authorizing such adjustment or cancellation was constitutional and valid, and said:

> "It is a practical business matter within the range of a proceeding such as this. The consent of creditors to it is given through the bankruptcy machinery."

We submit that under the facts found by the Master, which the Court approved, no unfairness to any bondholder will result from the adjustment of these so-called assessment liens. Not only are the liens, if they be liens, without value but the Court will not assume that the Town would make an unfair adjustment if such an adjustment should be found possible. The whole matter is discretionary

with the governing authority of the Town, and it must be presumed that such authority will act fairly and honestly.

Respectfully submitted,

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Tampa, Florida,
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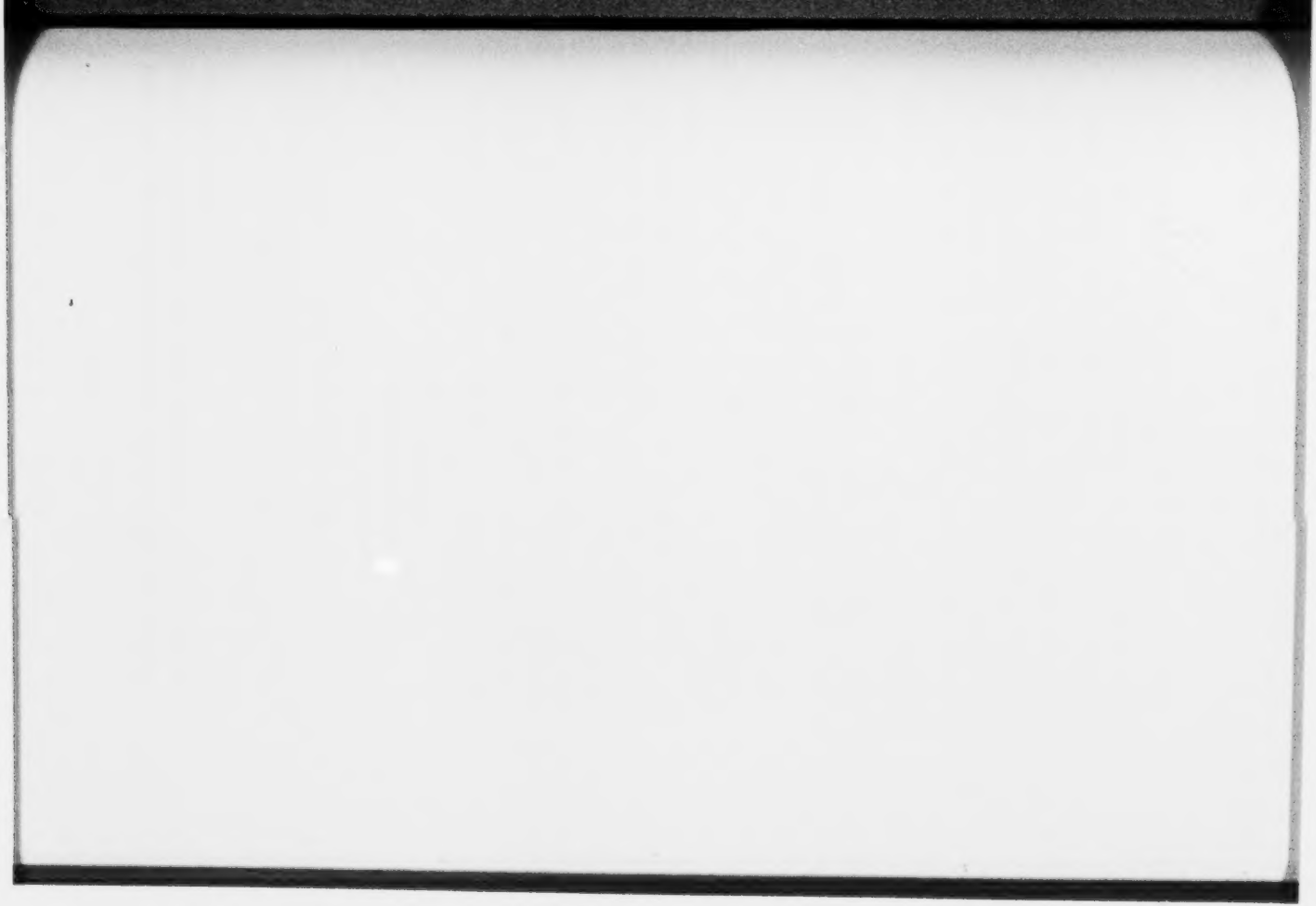

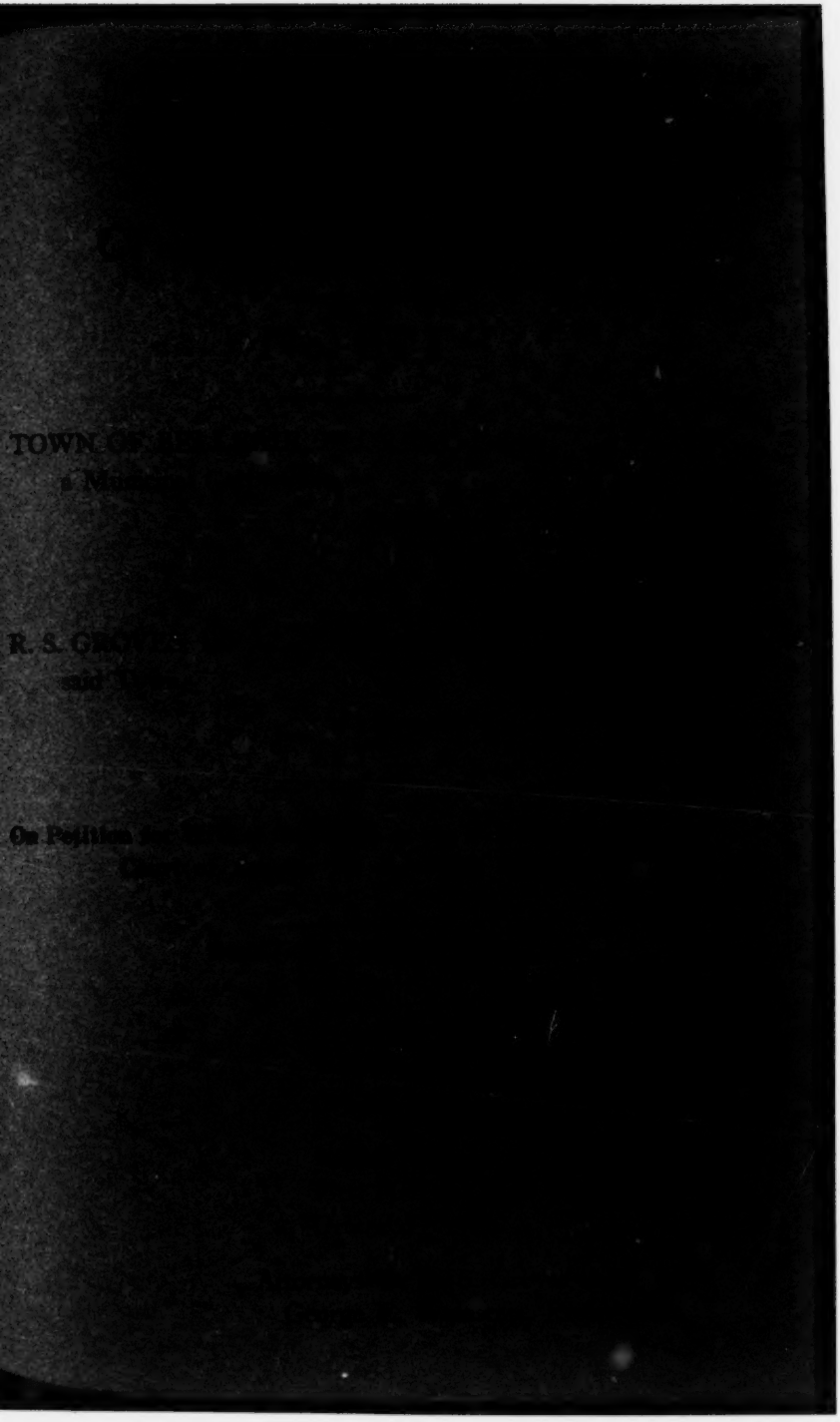

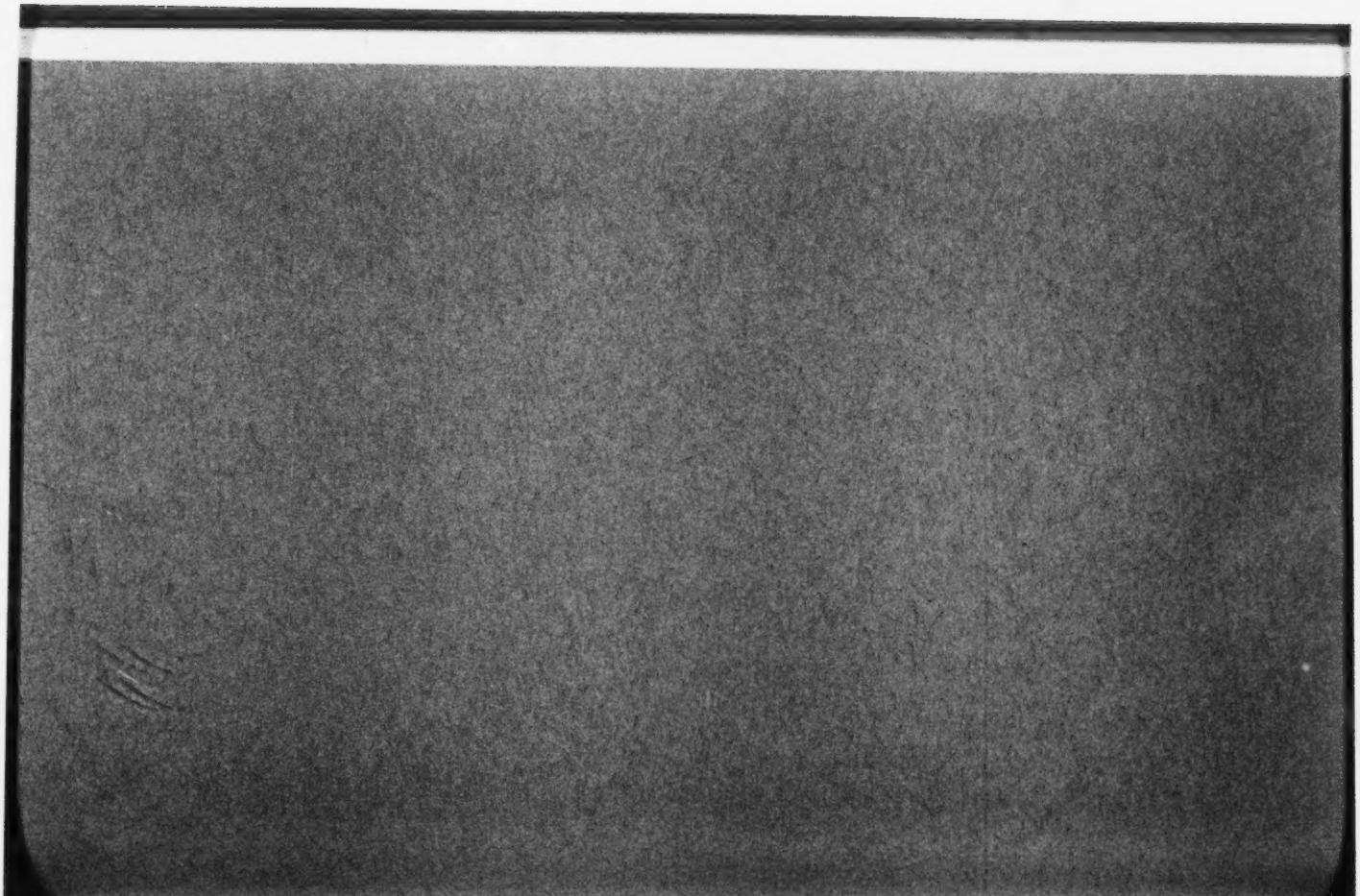

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SUPREME COURT OF THE UNITED STATES

No. 671

TOWN OF BELLEAIR, FLORIDA, Debtor,
a Municipal Corporation,
Petitioner,

vs.

R. S. GROVES, ET AL., Creditors of the
said Town,
Respondents.

BRIEF IN OPPOSITION

I. STATEMENT OF THE CASE.

The Town of Belleair, Florida, filed a petition in the United States District Court for the confirmation of a Plan of Composition of certain of its indebtedness under the provisions of the Municipal Bankruptcy Act (11 U. S. C. 401-403). The Plan (R. 4-17) was in the form of a contract between the Town and the consenting creditors, and the attorneys for the Town, who were also consenting creditors. The only consenting creditors to the Plan were Palmer, Hobart, Kirkeby, and Haley & Reaves (the attorneys) who controlled approximately 68 per cent of the indebtedness; the holders of approximately 23 per cent of the indebtedness objected to the Plan.

The Plan, in substance, provided:

1. That the principal indebtedness described in it would be refunded by the issuance of bonds dated July 1, 1940, bearing four per cent interest per annum in the ratio of thirty cents on the dollar for principal, and nothing for interest, (R. 4) all interest indebtedness and seventy per cent of the principal indebtedness would be wiped out.

2. Hobart and Palmer (consentors to the Plan, and holders of bonds involved in a peremptory writ of mandamus for levy against the Town in the sum of $21,000. in principal and $11,000. in interest) were to receive twenty-one bonds bearing six per cent interest, dated July 15, 1940, and to mature serially over a period of five years. The bonds involved in the action were precisely of the same class as all other bonds, which the Town and the consentors (Hobart, Palmer and others) proposed to reduce by seventy per cent of principal, and wipe out all accrued interest thereon.

3. Hobart, Palmer (consenting creditors) and others were to be paid $18,000.00 in cash, with interest from February 1, 1940, at six per cent per annum, the balance due under a certain trust agreement under which the Town had been purchasing $90,000. in par value Water and Gas Bonds, which bonds were of the same class as all other bonds being composed in the proceedings. These ninety bonds, under the trust agreement, (R. 237) were being purchased by the Town at a price of $72,000.00 in cash (80 cents on the dollar flat in cash) (all other bonds of the same class were to be refunded by an exchange of bonds at thirty cents on the dollar flat, and nothing for interest). The Water and Gas Bonds were to be held intact and uncancelled until the amounts thereon were paid and then the bonds were to be cancelled.

4. Haley and Reaves, the attorneys for the Town, and consentors to the Plan, were to receive thirty-five bonds of the same class and denomination as all other creditors for their services performed and to be performed, (some of which were for suits against the Town with "the cooperation of the Town authorities"—see contract dated November 13, 1940 (R. 252)).

As stated above, the only consenting creditors to the Plan were Palmer, Hobart, Kirkeby and Haley & Reaves, who controlled approximately sixty-eight per cent of the alleged indebtedness. The holders of approximately twenty-three per cent of the indebtedness objected to the Plan, the remaining eight per cent of the creditors have taken no part in the case. Objections were filed to the Plan by Groves and Wainscott, Respondents herein, and the holders of judgments approximating $145,000.00, alleging in substance that the Plan of Composition, and its acceptance was not filed in good faith, but was a collusive and fraudulent scheme on the part of the Town and the consenting creditors, who were likewise the largest taxpayers in the Town, or who were interested in various corporate devices, which in turn were taxpayers in the Town, to compose the debts of the Town at far less than the ability of the Town to pay, and thus bring about a discriminatory saving to the taxpaying consenting bondholders at the expense of other bondholders; that the consenting creditors acquired the bonds held by them in a sufficient amount to comply with the requirements of the Bankruptcy Act, solely for the purpose of furthering the collusive and discriminatory scheme, and that the price paid for the securities was far below the par value thereof; that the depreciated value of the securities was brought about in a great part by injunctive suits and other litigation on the part of the consenting creditors as a part of this same collusive scheme to depress the market value of

these securities, and thus reap the benefit to the consenting creditors, as taxpayers, and not as bondholders (R. 27-34).

Objection was further raised to that part of the Plan by Palmer and Hobart, two of the consenting creditors, which were to receive short term high interest rate bonds at par for par for the $21,000. item due under the peremptory writ of mandamus, while at the same time requiring other creditors holding securities of the same class to take a seventy per cent cut in principal, to forgive all interest and to take callable bonds maturing in twenty years, bearing a lower rate of interest than those offered to Palmer and Hobart. Objection was further made to that part of the Plan which would issue refunding bonds to Haley & Reaves, consenting creditors, at par for par for their alleged claim for services by issuing them bonds of the same class as all other bondholders; that the Plan of Composition in general discriminated unfairly in favor of the consenting creditors, Palmer, Hobart, Kirkeby and Haley, as taxpayers, and discriminated unfairly against creditors who were not taxpayers; that the offer of the Plan and its acceptance were in bad faith, and were brought about by collusion and fraud. The objections of all other objecting creditors were substantially the same as those of these respondents.

The only testimony offered before the Master in support of the Plan was that of the Town and the consenting creditors. The objecting creditors offered no testimony as to the ability of the Town to pay, or as to any other matter, but at the end of the testimony submitted by the Town and the consenting creditors, the objectors (the holders of approximately twenty-three per cent of the indebtedness), following the provisions of Rule 50, F. R. C. P., filed various motions to dismiss the case (R. 225), contending that it affirmatively appeared from

the testimony of the proponents of the Plan that it did not comply with the provisions of the Municipal Bankruptcy Act, and that the proceedings therefore should be dismissed. Thereupon, the Master rendered his report (R. 42-61), finding that the Plan, in its practical incidence, did not comply with the provisions of the Municipal Bankruptcy Act (11 U. S. C. 403 (e)) for many reasons. He further found that the consenting creditors to the Plan had received preferential payments of money during the trial of the case (R. 49-57). After the filing of the Master's report, and on exceptions to it, the Court approved the findings and conclusions of the Master (R. 263) in all respects, except that it determined that the so-called "Water and Gas Bonds" should be included in any new plan in like manner as all other bonds (R. 268-269), and that the Plan discriminated unfairly in favor of the taxpaying bondholders (the consenting creditors) as against non-taxpaying bondholders (the objecting creditors).

The Court further found that the Petitioner had made known its desire to submit an amended or modified Plan, and allowed it sixty days from the date of the order in which to prepare and file the same. (R. 273.) The Town filed no modified plan within the sixty days allowed, but immediately appealed to the United States Circuit Court of Appeals, which appeal was dismissed by that Court (127 F. (2) 279) as not being from a final order. After the mandate came down from that case, the Town filed slight modifications (R. 289), but in substance it was the same as the original plan, and did not comply with the ruling of the Court of July 22, 1941, requiring that some differential be made between the taxpaying bondholders and the non-taxpaying bondholders. Motion was thereupon made to strike the modified plan and dismiss the proceedings (R. 295) upon several grounds. No new testimony was taken and the Court made findings of fact and con-

clusions of law from the Master's report (R. 308), saying "it is not necessary for the Court to rule upon the legal sufficiency of Sections 1, 2, 3, 4 or any portion of the plan, except as set forth in the above conclusions numbered 1 and 2."

Conclusion No. 1 (R. 304), in substance, was that the so-called "Water and Gas Bonds" should be treated in like manner as all other bonds. Conclusion No. 2 (R. 305), in substance, was that the modified plan discriminated unfairly in favor of property owning bondholders, and against the non-property owning bondholders. Thereupon, the Court dismissed the proceedings without prejudice to the right of the City to file a new plan not inconsistent with the order of the Court. None of the consenting creditors have filed notices of appeal from the order, and they are not before this Court.

II. ARGUMENT

The form of the Plan of Composition submitted to a bankruptcy court for confirmation is relatively unimportant, except that it must prima facie conform to the statute so that the Judge may see that it is properly filed. After the plan is filed and the Court receives testimony in support of it, an examination of the essential nature of the plan and the practical result of its completion and operation are looked to in determining whether or not, in its practical aspect, the plan is really fair and equitable and does not discriminate unfairly in favor of any creditor. *American United Mutual Life Insurance Co. vs. City of Avon Park*, 311 U. S. 138, 61 S. Ct. 157, 85 L.

Ed. 112. The Court in this case pointed out that the necessity for the exercise of the equitable powers of the Court

> "is based upon the responsibility of the Court before entering an order of confirmation to be satisfied that the plan in its practical incidence embodies a fair and equitable bargain openly arrived at and devoid of overreaching, however subtle."

Following this rule, not only the Master, but the Judge in the lower court, cut through the technical elements and applied the fundamental purpose of the bankruptcy law to the facts adduced by the proponents of the plan in support of it. They found not equality between the creditors of the plan, but inequality. The record, it is submitted, shows that the consents were not obtained as a result of a fair and equitable bargain, openly arrived at as between a debtor (the Town), acting as a debtor, and two-thirds of the creditors of the debtor (the consenting creditors), acting as creditors for the benefit of the creditors, but was a scheme and a device fused in one simple purpose by the Town and the consenting creditors, (who for all intents and purposes are one and the same), joined together, and acting in a concerted action to reduce the indebtedness of the Town as much as possible, all of which would accrue to the benefit of the consenting creditors and to the detriment of the objectors. In other words, the District Judge followed the rule laid down by this Court in the case of *American United Mutual Life Insurance Company vs. City of Avon Park*, supra, and found "special benefits to the organizers" not accorded other creditors.

A brief history of the case, as shown by the uncontradicted testimony, will clearly convince this Court that the practical work-out of the Plan is most inequitable to the creditors who are not taxpayers in the Town.

The Town is located in Pinellas County, Florida, in the resort area, and has located in it the large pretentious seasonal hotel known as "Bellevue Hotel" (R. 44). There are approximately seventy-six residences in the Town other than the hotel properties; in addition to these residences and the hotel properties, the Town is composed of approximately one thousand vacant lots, most of which lie in a subdivision known as "Belleair Estates" (R. 72). According to the State Tax Assessor the Town has an assessed valution of over $2,000,000.

The testimony shows that Mr. Haley, one of the Town Attorneys and a consentor to the Plan, became interested in the Town in 1925 (R. 106) as one of the stockholders in Belleair Estates, Inc. (R. 124), and in 1934, he became associated with Mr. Reaves (attorney for the Town and a consentor to the Plan) in litigation against the Town contesting the validity of the bonds. Mr. Haley and Mr. Reaves at that time were representing Palmer and Hobart (other consenting creditors to the Plan), as taxpayers, the Town being defendants in the various actions. No fees were paid these attorneys and consentors to the Plan for the extensive litigation carried on against the Town, although Palmer and Hobart (consentors) paid the out-of-pocket expenses. Then in 1937 Haley became financially interested in the Clearwater Bay Company, a corporation likewise composed of Palmer and Hobart, consenting creditors, which company had purchased the delinquent tax certificates from 1926 to 1936 on about one thousand lots lying in that part of the Town, known as "Belleair Estates." Haley and Reaves, according to the testimony, were instrumental in securing the decision while representing Palmer and Hobart, among others, in the case of *State vs. Town of Belleair*, 125 Fla. 669, 170 So. 434, (1936) contesting the validity of the

bonds. Immediately after this decision Haley and Reaves, still representing Palmer and Hobart, consenting creditors, among others, as taxpayers, brought suit against the Town in the case of *Olds vs. Alvord*, 133 Fla. 221, 183 So. 711, to enjoin the Town from collecting any taxes whatsoever to pay any of its bonded indebtedness. Other litigation was brought by these parties with no promise of fee to be paid either of these attorneys during this extensive litigation although Palmer and Hobart paid the out-of-pocket expenses (R. 129-139). Haley became the attorney for the Town in 1939, and as to his position on both sides of the litigation he said: "As Town Attorney, I was not only * * * [interested] * * * in seeing bonds held invalid on the part of Palmer, Hobart and others, but also on the part of the Town." (R. 136.) In March, 1940, Haley, as City Attorney, went to Chicago to see the then holders of the bonds to see about working out a refunding plan. The holders of the bonds refused to take thirty cents on the dollar in bonds and forgive all interest coupons, but agreed to take thirty cents on the dollar flat in *cash*. After several days discussion, Haley then came back and induced Hobart to put up some money to buy these bonds (R. 118). Hobart then suggested that Palmer and Kirkeby join the syndicate to furnish sufficient moneys to purchase bonds from the bondholders in Detroit at thirty cents on the dollar flat, it being understood that enough bonds must be purchased to give the syndicate 66 2/3rds per cent of the claims. Haley testified that Hobart, Palmer and Kirkeby would not have touched the bonds at any price "except for their interest in the Town, both as property owners and community interests there," (R. 120) and that they had all agreed beforehand "to put over a refunding plan to all of the bondholders at exactly what they paid for them" (R. 120), that is to say, they had agreed to put over the refunding plan at thirty cents on the dollar flat, regardless of the ability of the City to pay.

The interest of Haley, Palmer, Hobart and Kirkeby (consentors to the Plan), as taxpayers, immediate or prospective, appears generally as follows: Palmer, Haley and Hobart owned tax certificates on approximately one thousand lots in Belleair Estates (R. 133), which were purchased at greatly reduced prices. Haley was to receive "a one-third interest in consideration of attorney fees and was to act in clearing up the property and titles in the Clearwater Bay Company, if they go through with the plan" (R. 133). Haley is now a director and stockholder in this company (R. 145). These certificated lots bear approximately nineteen or twenty per cent of the tax load of the Town. The other real estate holdings of Palmer and Hobart represent approximately sixteen per cent of the assessed valuation of the Town (R. 172). Kirkeby, the manager of the Belleview-Biltmore Hotel (the hotel was purchased on April 15, 1940), said the only reason he purchased the bonds was "due to the fact *I was interested in some property* there and the fact that the City's debts were in the condition they were at the time, which was hampering the sale of the property we owned there." (R. 181). The hotel was purchased on April 15, 1940, the bonds were purchased on July 5, 1940, and the plan was filed August 31, 1940. There is no evidence that any other bondholders were ever consulted.

Thus it is that the interests, as taxpayers, immediate or prospective, of these various consenting creditors, appeared as follows:

Clearwater Bay Company, composed of the consenting creditors, Hobart, Palmer and Haley	20%

Hobart and Palmer, personal ownership of lands 16%
Belleair Hotel Properties (Kirkeby) 28%

Moreover, as pointed out previously, these very consentors, during the years from 1932 to 1939 (R. 210) were bringing various suits and actions against the Town by these very same attorneys to contest the validity of the bonds, and to enjoin the Town from levying any taxes to pay the bonds, and no taxes whatsoever during the above-mentioned years were levied for debt service.

The Master found that the consenting creditors, holding approximately 68 per cent of the bonds, were interested in 63 per cent of the property in the Town (R. 55-56). This finding was concurred in by the Court (R. 270), and is thus binding on this Court. *Union Trust Co. vs. Wilson*, 198 U. S. 530, 255 S. Ct. 766, 49 L. Ed. 1154. The Court made this very pertinent observation as to the acquisition of the bonds by the syndicate for the purpose of putting over the refunding plan. The Court said that the syndicate property owning bondholders (R. 271, 306)

> "acquired the controlling amount of the securities of the City for the purpose of putting into effect a Plan of Composition in bankruptcy which would eventually give back to them dollar for dollar all the money advanced by them to the City and for the City and for themselves, with the result that other property would ultimately be relieved of tax liabilities and liens approximating three-quarters of a million dollars, by means of a plan of composition which made no compensating differential to the non-property owning bondholders. *We do not have a situation where a property owner is an incidental owner of a small amount of the bonds of the City, but we have a situation where the property owners purchased a sufficient amount*

of the bonds with the intent and purpose of putting the City into bankruptcy to the vastly greater benefit of themselves than of the non-property owning bondholders."

Thus it is that the consents to the Plan were not obtained as a result of a fair and equitable bargain openly arrived at between the City, as debtor, and the consentors, as creditors. The original bondholders would not consent to taking thirty cents on the dollar in bonds where there was no benefit accruing to them as owners of the property in the Town, consequently they were paid thirty cents on the dollar in cash by the property owning bondholders, who were then willing to accept thirty cents on the dollar in bonds because of the benefits accruing to them as property owners, and who would thus attempt to impose this condition on all other bondholders who received no such benefits as the owners of the property in the Town. This was a special inducement to the property owners only. Tax bills were to be reduced by nearly $1,000,000. and the consenting bondholders purchased the bonds from persons who would not agree to this plan for this very purpose (R. 272), and it is quite pertinent also to point out that where these very consenting creditors paid par for their bonds, they were not willing to vote for the Plan of Composition that contemplated any reduction in their claim, as for instance, that part of the plan which would give them back dollar for dollar of the bonds involved in the item of the peremptory writ of mandamus. All of this reduction in the amount of outstanding taxes on the land of the consenting creditors and the receipt by them of dollar for dollar of what they paid for their securities was the motivating force which led to the purchase of the bonds and the filing of the petition. This Court, in the case of *American United Mutual Life Insurance Company vs. Avon Park,* supra, referred to the question of whether or not the claims of the "fiscal agent" of a City should be voted in favor of a Plan of Composition. The Court pointed out

that *presumptively* such claims would seem to fall within the prohibitive category of being controlled by the City, and therefore must be excluded by virtue of that part of the Act which requires the exclusion of claims owned, held or controlled by the Petitioner, 11 U. S. C. 403 (d), the Court saying:

> "The abuse at which the Act is aimed is not confined to those cases where the holder of the claims is an agent of the city within the strict rules of respondeat superior. Rather, the test is whether or not there is such close identity of interests between the claimant and the city that the claimant's assent to the plan may fairly be said to be more the product of the city's influence and to reflect more the city's desires than an expression of an investor's independent business judgment. Here there was such a close identity of interest between Crummer and the City *vis-a-vis* the refunding as to raise grave doubts as to the propriety of allowing those claims to vote in any event."

Thus, if the fiscal agent cannot vote securities in favor of the plan, and the agent was getting certain inducements, as was set forth in the opinion in the Avon Park case for its vote, which this court broke down as unfair and inequitable, then by the very stronger reason the evidence in this case shows that the holders of 68 per cent of the indebtedness would be relieved of paying 63 per cent of all the taxes, and purchased the bonds for the very purpose of putting the plan into effect at the price at which they paid for their bonds was not really a contract entered into between the Town and its creditors, but was really a scheme on the part of the Town itself to reduce its indebtedness.

We do not have a case where a bondholder may be incidentally a taxpayer, but we have a case, as shown from the record, where three taxpayers of the Town, together with the attorney for those taxpayers, set out on a decided and set

course of procedure to put through a refunding for the sole purpose of benefiting their real estate holdings, and it thus appears that their interests are as taxpayers and not as tax receivers (bondholders). Certainly the consenting creditors, if they were "independent investors" of municipal securities, would not reach an agreement with the Town, as creditors of the Town, by which they, as creditors, would voluntarily relinquish claims against the Town in the sum of hundreds of thousands of dollars once there was some inducement other than merely the getting of a refunding bond for the securities which they purchased.

A very similar case is that of *In Re Kaufman County Improvement District No. 4,* (D. C. Texas) (1940), 34 Fed. Supp. 670, affirmed *Kaufman County Improvement District No. 4 vs. Mitchell,* (C. C. A. 5) 116 F. (2) 959. In that case the landowning bondholders had caused the market on the bonds to be depressed over a number of years; the District had collected no taxes for a number of years, then the land owning bondholders bought up sufficient bonds at depreciated prices and attempted to compose the indebtedness of the District at a greatly reduced figure. The bondholders, who were not taxpayers, objected, claiming they would receive no benefit from the lowering of the taxes in the District. The District Court dismissed the proceeding as not complying with the Bankruptcy Act, and as being discriminatory in favor of the tax paying bondholders, saying:

> "Now, these bond sellers have also become bond buyers when the original bond buyers were dissatisfied or were disgusted with their investments, or it may be that they needed their money and they began to sell them very cheap and very low. * * *
> "I cannot say, as a matter of law, that this is 'fair and equitable'—'fair and equitable and for the best interest

of the creditors, and does not discriminate unfairly in favor of any creditor or class of creditors.' I cannot say that. It does discriminate. That is the purpose of it. That is the reason they went this route. There is little use to talk about that. It is apparent on its face; they thought if they did nothing and paid nothing and let it go to weeds and grass, then they could buy it in and do what they pleased with it, and I am not going to approve it."

"I think I have already found, if I haven't I do now, that I think this condition is the result of a tacit understanding by the landowners within the district. * * * It follows that I cannot approve this plan because of its unfairness and discriminatory nature toward creditors, *and the petition may*, therefore, be dismissed." (Emphasis added.)

On appeal to the United States Circuit Court of Appeals, Fifth Circuit, *In Re Kaufman County Improvement District No. 4 vs. Mitchell*, (C. C. A. 5) (1940) 116 F. (2) 959, the judgment of the District Court was affirmed. The Circuit Court of Appeals agreed with the lower court that "the plan was unfair and discriminatory", and that "in the present case the land owning bondholders should either have been excluded from participation in determining the requisite percentages, or there should have been separate classifications, whereby those creditors owning no lands could have voted and been recorded as such."

That is just what happened in the instant case. The non-land owning bondholders have objected, and the Court has found that their objections are well founded; that the Plan discriminates in favor of other bondholders, the other bondholders should have appealed and not the Town.

1. The Town Cannot Champion the Rights of Third Parties Who Have Not Appealed.

The brief of the Petitioner goes to some length in an attempt to convince this Court that the decision of the lower court held that the Plan was unfair to the consenting creditors, and further points out that the lower court has determined that approximately thirty per cent of par is all that the Town can now reasonably pay. Of course, the objectors have put on no testimony in rebuttal since on the motion to dismiss the lower court and the master found that the Plan did not comply with the Bankruptcy Act. Be that as it may, this observation made by the lower court is interesting (R. 272):

> "Under the evidence in the record, thirty cents on the dollar represents the City's maximum ability to pay. If that be true, and for the present it is an established fact, then the plan of composition should contain some compensating differential in the pe rcentage to be paid the non-property-owning bondholder over that of the property-owning-bondholder."

Not a single consenting creditor who would naturally be affected by the ruling appealed from the judgment of the Court, and they are not now before this Court. The consentors (the property owning bondholders) are the only parties entitled to be heard on the point. As far as the debtor is concerned, it makes no difference to it how the various equities are adjusted among its creditors so long as the maximum thirty per cent of par is retained under the present finding of the court. The Town is not adversely affected by that ruling. It cannot champion the rights of third parties. *McCabe vs. Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 162, 35 S. Ct. 69, 71, 59 L. Ed. 169; *Standard Stock Food Co. vs. Wright*, 225 U. S. 540, 550, 32 S. Ct. 784, 56 L. Ed. 1197; *Cronin vs.*

Adams, 192 U. S. 1081, 24 S. Ct. 219, 48 L. Ed. 365; *Red River Valley National Bank of Fargo vs. Craig*, 181 U. S. 548, 21 S. Ct. 703, 707, 45 L. Ed. 994.

2. The Water and Gas Bonds.

The Town contends that the Court erred in determining that the $90,000.00 of Water and Gas Bonds, described in Section 3 of the Plan of Composition (R. 6) should be refunded in the exact manner as all other bonds. It is indeed hard to understand how the debtor takes this position before the Court. The debtor, in effect, is contending that it should be allowed to pay part of its debt at much higher rates and for much more money to some of its creditors, who incidentally have consented to that method of payment, rather than to refund this indebtedness upon a much lower basis and on the same terms that it would issue bonds to all other creditors. The trust agreement provides that the $90,000. in Water and Gas Bonds would be purchased by the City at $72,000. (or 80 cents on the dollar flat in cash), (under the plan all other bonds would be refunded by an exchange of bonds at 30 cents on the dollar flat). Messrs. Palmer and Hobart, consenting creditors, and others are parties to that trust agreement. The City contends that by virtue of this trust agreement these securities are placed in a different class than other bonds which have not been so fortunate as to make a side agreement with the Town as to how much they should take for their bonds. The trust agreement can be no stronger than the contract in the bonds themselves, and certainly can be no stronger than a final judgment in a court by a writ of mandamus requiring the levy of a tax to pay bonds at 100 cents on the dollar, yet it has already been determined that such a judgment in mandamus creates no right in any creditor which would place it

in any position different from any other creditor. *Vallette vs. Vero Beach*, 104 F. (2) 59; *Touchton vs. Fort Pierce*, 109 F. (2) 370, Cert. Den. 84 L. Ed. 1417. Thus it is that there was no error by the lower court holding that these bonds should be treated in exact manner as all other bonds. The mere fact that the City itself is objecting to the reduction of bonds to the same plane as all of the others is one element indicating how it is completely dominated by the consenting creditors, none of whom have appealed from the orders of the lower district court.

3. No Important Questions of Federal Law Decided.

Petitioner contends that the decision of the lower court has decided an "important question of federal law", and that this Court should therefore review the action of that lower court. It is quite apparent that the whole case turned upon testimony produced, and therefore there is no sufficient ground shown for this Court to review the proceedings.

It is therefore, respectfully submitted that petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT J. PLEUS,

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